Subject to the provisions of the laws of Malaysia regarding the allowance as a credit against Malaysian tax of tax payable in any country other than Malaysia, Singapore tax payable whether directly or by deduction, in respect of income derived from Singapore, shall be allowed as a credit against Malaysian tax chargeable in respect of that income.

It should be noted that in para 2(i) of art XVIII no reference is made to any year of assessment, so that it is immaterial and irrelevant which year of assessment the tax mentioned in that paragraph is in respect of. It is important to note the words 'that income' at the end of that paragraph. These words specifically and expressly refer to the same 'income derived from Singapore' referred to earlier in that paragraph. Thus that paragraph means that Singapore tax payable in respect of a certain income derived from Singapore shall be allowed as a credit against Malaysian tax assessed on that same income derived from Singapore, irrespective of which year of assessment that Singapore tax was assessed for and irrespective of which year of assessment that Malaysian tax was assessed for. In the present case the Singapore income tax of $531,770.20 referred to above was assessed on the income of the respondent company's Singapore branch of $1,329,433. The Malaysian income tax of $1,546,214.40 referred to above includes income tax assessed on that same income of $1,329,433 of the branch. Therefore a credit of $531,770.20 representing the amount of that Singapore income tax should be given against that Malaysian income tax of $1,546,214.40 although that Singapore income tax was not in respect of the same year of assessment as that Malaysian income tax.

Therefore the decision of the High Court is correct. We dismiss this appeal with costs.

Appeal dismissed.

Solicitors: *Shearn Delamore & Co.*

Reported by *Prof Ahmad Ibrahim*

Ho Shee Jan v Hadayat Harta Holdings Sdn Bhd

SUPREME COURT (KUALA LUMPUR) – SUPREME COURT CIVIL APPEAL NO 551 OF 1987
SALLEH ABAS LP, MOHAMED AZMI AND WAN HAMZAH SCJJ
23 MARCH AND 25 NOVEMBER 1988

Land Law – Caveat – Sale of land – Agreement for repurchase – Repurchase price paid in full – Land registered in name of original vendor – Caveats entered against land – Aplication by purchaser to have caveats removed

The respondent in this case had agreed to sell three lots of land to the appellant for the price of $330,000 which the respondent acknowledged to have received. It was agreed in the agreement that the respondent should be the developer and contractor for the construction of all housing units on the land as approved by the authorities and that the respondent should complete the development and construction work at the respondent's expense within a period of 30 months from the date of the agreement or such extended period as the appellant might agree. It was also agreed that the respondent should repurchase the said land for the sum of $580,000. Although the purchase price was paid in full the said land had not been transferred to the name of the appellant and the respondent's name remained as the registered owner. The appellant subsequently applied to enter caveats against the land. He claimed to be the purchaser of the land and also claimed that the respondent had not completed the repurchase of the land. The respondent applied to the High Court for the removal of the caveats. The respondent contended that the repurchase had been completed and it had become the owner and the appellant had no more caveatable interest in the said land. It was not disputed that the respondent had paid the appellant a total sum of $360,000 towards the repurchase price of $580,000. The balance sum of $220,000 was the subject matter of the subsequent transactions between the parties as a result of which the respondent contended that the balance of the repurchase price had been paid, but the appellant contended otherwise.

The learned judge of the High Court granted the application of the respondent for removal of the caveats. The appellant appealed to the Supreme Court.

Held (Mohamed Azmi and Wan Hamzah SCJJ), dismissing the appeal:

(1) On the facts the respondent had paid the appellant in full the repurchase price of $580,000 and therefore the appellant did not have a caveatable interest any more in the said land or the subdivided lots thereof.

(2) All the caveats should be removed, except the caveats which had been entered against the lots agreed to be sold by the respondent to the appellant.

Legislation referred to
Evidence Act 1950 ss 91, 92

Appeal from: Originating Motion No 32-15 of 1986 (High Court, Johore Bahru)

Teh Poh Taik for the appellant.
Choo Kong Yong for the respondent.

Cur Adv Vult

Wan Hamzah SCJ (delivering the judgment of Mohamed Azmi SCJ and himself): Hadayat Harta Holding Sdn Bhd ('Hadayat') entered into an agreement dated 29 August 1981 ('the main agreement') with Ho Shee Jan ('Ho') whereby Hadayat agreed to sell to Ho three lots of land ('the said land') in the Mukim of Jeram Batu which were at that time registered in Hadayat's name under Grants No 5, 6 and 7 for Lots No 3786, 3787 and 3788 respectively, for the price of $330,000, which Hadayat acknowledged to have received, free from all encumbrances and with vacant possession. At that time an application for the subdivision of the lots and for the issue of separate titles for the subdivided lots had been made to the proper authorities, and it was agreed in the main agreement that Hadayat should be the developer and contractor for the construction of all the housing units on the said land as approved by the authorities and that

Hadayat should complete the development and construction work at Hadayat's own expense within a period of 30 months from the date of the main agreement or such extended period as Ho may agree. It was further agreed in the main agreement that Hadayat should repurchase the said land for the sum of $580,000. It was provided that time shall be the essence of the agreement, but no time was fixed for the completion of the repurchase of the said land by Hadayat. There are other terms in the main agreement, which in our opinion are not important for the purpose of the consideration of this appeal.

Eventually subdivision of the said land into 156 subdivided lots was completed and separate titles were issued in respect of the subdivided lots. The following are the titles issued: HS(M) 685 to HS(M) 812 for PTD 4435 to PTD 4562 respectively, and HS(M) 813 to HS(M) 840 for PTD 4563 to PTD 4590 respectively.

Although Ho paid the purchase price in full the said land or the subdivided lots thereof have not been transferred to Ho and Hadayat's name remains as the registered owner. On 9 April 1985 Ho applied to the Collector of Land Revenue to enter caveats against 23 of the subdivided lots, ie the lots under HS(M) 818 to HS(M) 839 for PTD 4568 to PTD 4580 respectively and HS(M) 814 for PTD 4564. In his statutory declaration supporting the application Ho stated his interest in the subdivided lots as a purchaser and attached to it a copy of the main agreement. Caveats were accordingly entered against these lots, and subsequently Hadayat applied to the High Court for an order to remove the caveats. On 19 November 1987 the High Court granted the order for removal and further ordered that damages be assessed and awarded to Hadayat. The present appeal before the Supreme Court is brought by Ho against that decision of the High Court.

Ho's contention is that Hadayat has not completed the repurchase of the said land as agreed in the main agreement and he is still the owner, and as the subdivided lots are still registered in the name of Hadayat, caveats are necessary to protect his interest. On the other hand Hadayat contends that the repurchase has been completed and it has become the owner and Ho has no more caveatable interest in the said land. Hadayat filed two affidavits in support of its application, and Ho filed two affidavits to oppose it. In his second affidavit Ho made some corrections to his first affidavit. It is not disputed by the parties that Hadayat had paid Ho a total sum of $360,000 towards the repurchase price of $580,000. Also it is not disputed that the balance sum of $220,000 has become the subject matter of subsequent transactions between the parties, of which $120,000 was in respect of one transaction and $100,000 was in respect of another transaction. But there is a dispute as to the effects and the results of the subsequent transactions.

We shall deal with the balance sum of $120,000 first. Hadayat's director stated in his second affidavit dated 6 September 1986 as follows:

> The respondent (Ho) chose to pay $120,000 to applicant's (Hadayat's) associate company, Hadayat Corporation Sdn Bhd through Messrs Yeow & Chin who used the said money to redeem the charge on the lands held under HS(D) 610 Lot 2639 and HS(D) 611 Lot 2640. That sum of $120,000 was in fact treated as partial payment towards the total purchase price of $310,000 for the said two lots. Up to date the respondent (Ho) had paid only $240,000 (inclusive of the $120,000) leaving a balance of $70,000 unpaid.

In his second affidavit dated 16 July 1987 Ho gave his version of this transaction as follows:

> At the request of the applicant (Hadayat), the balance sum of $120,000 was to be paid to me by the applicant to allow me to pay the sum of $120,000 to Malayan United Bank Bhd to discharge lands held under HS(D) 610 and HS(D) 611 for Lots 2639 and 2640, Mukim of Jeram Batu respectively which I had earlier purchased from the applicant's associate company, Hadayat Corporation (M) Sdn Bhd, who had charged those lands to Malayan United Bank Bhd. The $120,000 represented my final balance of the purchase price in respect of the aforesaid lands ... The $120,000 was paid to Messrs Yeow & Chin who on or about 2 March 1984 paid to Malayan United Bank Bhd to discharge the aforesaid lands which I purchased. The said sum of $120,000 was initially insufficient to discharge the two properties ... Only land held under HS(D) 610 Lot 2639 has been discharged while the other is still encumbered. Though HS(D) 610 Lot 2639 has been discharged the land has not been transferred to me. Messrs Yeow & Chin had by letter dated 21 April 1986 wrote to the applicant's associate company, Hadayat Corporaton (M) Sdn Bhd, for the execution of the transfer form but up to now they have refused and/or failed to execute the same.
>
> The balance sum of $220,000 represents the settlement in kind by the applicant to me by way of landed properties and because these landed properties are still encumbered and/or not transferred in my name, I verily believe that the applicant has not paid to me the total repurchase price of M$580,000.

Since Ho admitted that by his consent the sum of $120,000 was given to Messrs Yeow & Chin and paid by Messrs Yeow & Chin to the Malayan United Bank Bhd to discharge the land which he purchased, in our opinion the effect of this is that the sum of $120,000 should be treated as satisfaction of the balance sum ($120,000) of the repurchase price due from Hadayat. The dispute between Ho and Hadayat Corporation (M) Sdn Bhd as to whether Ho had paid in full the purchase price of the land HS(D) 610 Lot 2639 and HS(D) 611 Lot 2640 or whether Ho is entitled to have the two pieces of land transferred to him is a separate dispute which has no connection with the main agreement, in respect of which dispute Ho can bring a separate action in the court.

We shall now deal with the balance of $100,000 of the repurchase price due from Hadayat. The director of

Hadayat stated in his second affidavit dated 6 September 1986 that this balance was satisfied when Ho entered into a transaction whereby Ho bought apartment No B-2, 1st Floor, Rebong Park, Johore Bahru at the price of $160,000. In his first affidavit dated 29 August 1986 Ho gave his version of this transaction as follows:

> A further sum of $100,000 being the balance repurchase price of $580,000 was to be paid on or before 17 March 1984 as indicated by the applicant's (Hadayat's) letter dated 27 January 1984. Subsequently and again at the proposal of the applicant through the said Choh Yet, the sum of $100,000 was to be secured by a sale to me of one unit of apartment known as B-2, 1st floor, Rebong Park, Johore Bahru by Kemajuan Beringin Sdn Bhd with a right of repurchase of the said unit of apartment by Kemajuan Beringin Sdn Bhd for which the said Choh Yet was also a director. However, Kemajuan Beringin Sdn Bhd was unable to repurchase the said unit of apartment neither was it able to secure a good title for the said unit of apartment.

A copy of the sale and purchase agreement dated 14 February 1984 relating to the apartment was produced to the Supreme Court (it was not produced in the High Court). It shows that Kemajuan Beringin Sdn Bhd agreed to sell the apartment to Ho at the price of $160,000. It was stated in the agreement that the price had been fully paid and that option was given to Kemajuan Beringin Sdn Bhd to repurchase the apartment at the same price, the option to expire on 30 April 1984. In our opinion, on the basis of the facts given by Ho and quoted above the legal position is as follows. As Kemajuan Beringin Sdn Bhd did not exercise its option to repurchase, the apartment remains to be the property of Ho, and the position of the $100,000 balance of the repurchase price due to Ho from Hadayat does not change, that is to say it formed a payment of the price of the apartment which Ho bought. The position is not affected by the breach of the sale and purchase agreement on the part of Kemajuan Beringin Sdn Bhd by its failure to secure a good title for the apartment. The breach was not committed by Hadayat but by a third party.

Under the above circumstances we find that Hadayat had paid Ho in full the repurchase price of $580,000 and therefore under the main agreement Ho does not have caveatable interest any more in the said land or in the subdivided lots thereof. In our judgment all the caveats should be removed except the caveats which had been entered against the following lots, ie HS(M) 818 PTD 4568, HS(M) 825 PTD 4575 and HS(M) 826 PTD 4575. Ho produced to the High Court three sale and purchase agreements, all dated 14 February 1985, by which Hadayat agreed to sell to Ho the three lots of land at the price of $90,000 respectively. It is stated in cl 7 of each of the agreements that the balance of $75,000 of the price is to be paid within five years from the date of the agreement and that Ho is at liberty to enter a caveat. Regarding these three lots, Hadayat's director stated in his second affidavit dated 6 September 1986 as follows:

> ... the respondent did lend $45,000 to the applicant, ie $15,000 each for each title ie HS(M) 818 PTD 4568, HS(M) 825 PTD 4575 and HS(M) 826 PTD 4576. As security for the said $45,000, the applicant did sign three purported sale and purchase agreements, each lot is valued at $90,000, leaving a balance of $225,000 unpaid. The purported sale and purchase agreements are in fact a loan transaction as can be seen in cl 7 of the agreement and the continuing guarantee attached to each agreement. Furthermore the agreements are not properly executed. They are not executed in the presence of solicitors. The respondent had also orally consented to the sale of the aforesaid three properties to third parties.

In fact in cl 7 there is no reference to any loan transaction. Moreover Hadayat is prevented by ss 91 and 92 of the Evidence Act from saying that the three agreements dated 14 February 1985 are not sale and purchase agreements but agreements for money loans. Hadayat did not allege fraud, intimidation or mistake so as to bring the agreements within the proviso to s 92. In our judgment Ho has acquired interests in the three lots by virtue of the sale and purchase agreements, which he has the right to protect by caveats.

We affirm the High Court's order for the removal of the caveats except the caveats in respect of the above three lots. We make no order as to costs. We order that the deposit should be refunded to the appellant.

Order accordingly.

Solicitors: *Abdul Raman Saad & Associates*; *HH Long & Co.*

Reported by *Prof Ahmad Ibrahim*

Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor

SUPREME COURT (KUALA LUMPUR) – SUPREME COURT CIVIL APPEAL NO 487 OF 1986
LEE HUN HOE CJ (BORNEO), WAN SULEIMAN AND WAN HAMZAH SCJJ
14 OCTOBER 1987 AND 25 NOVEMBER 1988

Civil Procedure – Appeal – Question of fact – Conflicting evidence – Documentary evidence – Whether appeal court entitled to differ on questions of fact from trial court – Allegation of fraud – Burden of proof

Evidence – Allegation of fraud – Necessity for proof beyond reasonable doubt – Presumption – Evidence Act 1950, s 114(g)

In this case the first respondent had alleged that he had been induced by false and fraudulent misrepresentations by the solicitor acting for and on behalf of the appellant to vacate a shop